Supreme Court, U. S.
FILED
OCT 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-616

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, ET AL.,
Respondents,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, ET AL.,
Petitioners,

NORTHWEST OPPORTUNITY CENTER AND ELUTERIA D. MALDONADO,
Intervening Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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NORTHWEST OPPORTUNITY CENTER AND ELUTERIA D. MALDONADO,
Intervening Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Village of Arlington Heights, an Illinois municipal corporation, petitions for writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, decided June 10, 1975.

OPINIONS BELOW.

The Seventh Circuit's decision reversing the District Court is reported in 517 F. 2d 409 and is reprinted in full as Appendix A to this petition. The District Court's decision is reported at 373 F. Supp. 208 and is reprinted in full as Appendix B to this petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 10, 1975. The order en banc denying the petition for rehearing was entered on August 13, 1975, with the majority of the active members of the Court having voted to deny a hearing en banc and three judges voting that the petition be granted. A copy of the order of August 13, 1975 is reprinted as Appendix C to this petition. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. § 1254. This petition for writ of certiorari has been filed in accordance with 28 U. S. C. § 2101.

QUESTIONS PRESENTED FOR REVIEW.

1. Does the failure to grant a rezoning request for multiple-family housing for low- and moderate-income families in the midst of a single-family area violate the Fourteenth Amendment, even though the Village was admittedly maintaining the integrity of its zoning plan and protecting neighboring property values?

2. Does an alleged discriminatory housing pattern in the Chicago metropolitan area impose upon a suburban municipality an affirmative duty to ignore its admittedly proper zoning ordinance in order to permit the construction of multi-family low- and moderate-income housing?

3. Is housing a fundamental constitutional right which requires the application of the "compelling interest" test?

4. Did the plaintiffs overcome the presumption of validity attaching to the zoning ordinance of the Village of Arlington Heights?

5. Did the plaintiffs have sufficient standing to litigate the merits of the zoning ordinance?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

This case involves the Fourteenth Amendment of the Constitution of the United States; 42 U. S. C. A. §§ 1981-1982, the Civil Rights Act of 1866; 42 U. S. C. A. § 1983, the Civil Rights Act of 1871; 42 U. S. C. A. §§ 3601, et seq., the Fair Housing Act of 1968. The relevant provisions are set forth in Appendix D to this petition.

STATEMENT OF THE CASE.

(References Are to Appendices)

The plaintiff, Metropolitan Housing Development Corporation, is a not-for-profit corporation organized for the purpose of developing low- and moderate-income housing in the Chicago metropolitan area. It has a 99-year lease and sale agreement with the owners of the subject property which is a vacant 15-acre tract in the southeast corner of an 80-acre parcel owned by the Clerics of St. Viator who maintain a high school and novitiate on a portion of the larger tract in the Defendant Village of Arlington Heights. The contract and lease were subject to rezoning for multi-family purposes and the securing of a Section 236 financing commitment.

The property is zoned for R-3 One-Family Dwelling District under the Zoning Ordinance of the defendant Village, and has been zoned for single-family use since the first Village Zoning Ordinance. Under the Comprehensive Plan of 1959, the property was designated for single-family use.

Under the R-3 classification the property can be developed for single-family detached dwellings at a density of 8,750 square feet of lot area per dwelling. Approximately 50 single-family units can be placed upon the subject property.

The purchase price of the subject property is $300,000. The plaintiffs propose to use the land for 190 townhouses which were to be financed pursuant to Section 236 of the National Housing and Urban Development Act of 1968.

All the land surrounding the subject property is zoned and developed for R-3 single-family use. A map showing the existing land use and zoning and photographs of the development of the surrounding area which were received in evidence appear as Appendices E and F to this petition.

The plaintiff applied for a zoning change to the R-5 multiple-family classification. After public hearings, the Plan Commission recommended against the rezoning, and the Board of Trustees of the Village voted six to one to deny the request.

Suit was then instituted by the plaintiff, corporation, and certain individual plaintiffs seeking to represent moderate income minority persons who claimed to seek housing in Arlington Heights. A Mexican-American resident of Arlington Heights and a local community organization intervened. Federal jurisdiction was invoked by the plaintiffs' claim of a violation of the Fourteenth Amendment, Sections 1981, 1982 and 1983 of the Civil Rights Act, and the Fair Housing Act of 1968, 42 U. S. C. §§ 1981, 1982 and 1983, and §§ 3601, et seq.

The plaintiffs' evidence showed that 14 other sites in Arlington Heights were examined; 9 of them were rejected because they were too far removed from public facilities or were surrounded by single-family homes; 6 other sites were rejected because they were too expensive. The corporate plaintiff had previously developed a 212-unit low- and moderate-income multiple-family project in an unincorporated area three-fourths of a mile outside the corporate limits of the Village.

The 1970 population of the Village of Arlington Heights was 64,800. Based on 1970 census data, the plaintiffs' evidence showed that 3,244 Blacks could afford to live in Arlington Heights. The plaintiffs had not made a survey of housing preferences of Blacks employed in Arlington Heights and had not made an investigation of the number of Blacks or Spanish-speaking persons in Arlington Heights in 1971 at the time of the local hearing.

In August of 1973, there were 14,444 owner-occupied, single-family homes and 6,085 multiple-family units in Arlington Heights. At the time of the MHDC zoning hearing, there was land zoned but not developed for a total of 9,073 multiple-family dwelling units. The vacancy rate for apartments in

Arlington Heights according to the 1970 census was 11.5%. At the time of the MHDC hearing before the Plan Commission, at least seven parcels which were zoned for R-5 multiple purposes were for sale.

The defendants' evidence established the single-family character of the area in question, and the consistent Village policy of using the R-5 classification as a buffer between single-family uses and commercial or industrial uses. The subject property would not constitute such a buffer.

The defendants' expert testimony indicated that the proposed development would have an adverse effect on adjacent property owners and would have a detrimental effect on the value of single-family homes in the area. The defendants also introduced evidence showing that the subject property could be economically developed for single-family homes at a price range comparable or higher than the existing single-family homes in the area.

The trial court held that the evidence established that the Village Trustees were motivated by a legitimate desire to protect property values and the integrity of the Village's zoning plan. It further found that low-income workers do not have a constitutional right to low-rental housing either where they work or elsewhere. The trial court found that there was no evidence proving discrimination against racial minorities as distinguished from underprivileged persons generally, and that the decision was not an arbitrary or capricious act in violation of the Fourteenth Amendment. (B5, B7)

The Court of Appeals in reviewing evidence of other requested zoning changes in the Village found that the evidence did not necessitate a finding that the Village was administering its buffer zone policy in a discriminatory manner. (A5) It also concluded that the District Court's finding that the defendants were concerned with the integrity of the Village's zoning plan was not clearly erroneous. (A5) The Court of Appeals recognized that merely because racial minorities constituted a higher percentage of the low- and moderate-income category, this disparity did not necessarily mean that the zoning change refusal had the type of racially discriminatory effect that required the invocation of the compelling interest test. (A6)

The Court of Appeals however noted that historically the Chicago metropolitan area has been segregated and that in 1970 there were only 27 Black residents in Arlington Heights, and that in the four-township northwest Cook County area of which Arlington Heights is a part there was a population increase from 1960 to 1970 of 219,000 people, but only 170 of these were Black. The Court held that under the facts of the case, the Village's rejection of the Lincoln Green Project had racially discriminatory effects. It applied the compelling public interest test and concluded that the planning rationale behind the buffer zone policy and the fact that neighboring property might be diminished in value could not meet the compelling interest test. It concluded that since no compelling justification for the decision existed, the refusal to rezone was a violation of the Equal Protection Clause of the Fourteenth Amendment.

Chief Judge Fairchild dissented, noting that at the time of the Village's decision to deny the variance, there were at least 9 undeveloped tracts of land in excess of 15 acres zoned for R-5 multiple-family use, and that the record did not contain a sufficient showing that it was not reasonably possible to construct the proposed project on one of these sites.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The writ should be granted in this case because the decision of the Court of Appeals in reversing the trial court is clearly in conflict with the applicable decisions of this Court and establishes a novel view of the Fourteenth Amendment which threatens the validity of zoning ordinances not only in the Chicago metropolitan area, but throughout the nation. The explicit conclusion of the majority of the Court of Appeals is that a refusal to rezone property, which is clearly suitable for single-family purposes in the midst of a single-family area, constitutes a violation of the Fourteenth Amendment simply because there is a possibility that a larger percentage of Black residents may occupy the proposed multiple-family development than if the area were developed for single-family purposes. The majority's opinion holds for the first time that zoning principles must give way to racial considerations, while admitting that the zoning itself is proper by all conventional zoning standards, and that the trial court's finding that the defendants were concerned with the integrity of the Village Zoning Ordinance was not erroneous.

Moreover, the opinion applies the "compelling interest" test to a zoning controversy, notwithstanding the fact that this Court has specifically refused to apply that test in comparable factual situations.

The opinion now imposes for the first time a duty on a municipality to disregard its Comprehensive Plan and its Zoning Ordinance, which were admittedly not discriminatory in any manner, and to take affirmative steps to zone for racial integration because of segregation in the metropolitan area generally. The opinion is one of great consequence which demands the scrutiny of this Court.

I.

THE DECISION IS IN CONFLICT WITH THIS COURT'S REPEATED HOLDINGS THAT HOUSING AND ZONING ARE NOT SUBJECT TO THE "COMPELLING INTEREST" TEST. IT STRIKES DOWN AN ADMITTEDLY VALID LEGISLATIVE ACT SIMPLY BECAUSE THE POSSIBLE IMPACT FALLS UPON A LOWER INCOME GROUP WHICH COULD HAVE A HIGHER PERCENTAGE OF BLACKS THAN WHITES.

The Court of Appeals' opinion in this case breaks new ground. The majority of the Court in reversing the trial court conceded that the findings of the trial court with respect to the lack of discriminatory intent or application of the Arlington Heights Zoning Ordinance were correct. Nevertheless, the Court applied the "compelling interest" test to invalidate a local zoning ordinance simply because the economics of the marketplace dictated that a lower income group might otherwise be barred from the use of the subject property and that lower income group might contain a higher percentage of Blacks than would be the case for a use permitted under the ordinance. It should be noted that the importance of this case is such that three of the eight Circuit Judges voted in favor of granting a rehearing.

The need for this Court to settle the question raised by the Court of Appeals' opinion is obvious. If the opinion is allowed to stand, no zoning ordinance in the United States will be sustained in the face of an argument that a higher percentage of a minority group or poor people generally could occupy an area if the zoning was downgraded.

It should be noted in the first instance that the trial judge in this case made specific findings in his opinion which were not disputed by the Court of Appeals. The trial judge found that the plaintiffs failed to carry their burden of proving discrimination by the defendants as to racial minorities as distinguished from the underprivileged generally. There is no doubt that as

the trial judge found, housing for low earners is scarcer in Arlington Heights than in some other communities. But, as the trial court pointed out, this affects the entire low-income group, not merely Blacks. It is clear that the Fourteenth Amendment and the Civil Rights Act prohibit discrimination against Blacks and minorities, but they do not afford rights to poor people as such.

The record is also clear that Blacks and other minorities do live in Arlington Heights and that at the time of the original decision by the Village Board, there was an 11% vacancy rate for rental units in the Village. The individual intervenor-plaintiff, Eluteria D. Maldonado, is in fact a Mexican American who already resides in the Village. The Court of Appeals notes in passing that Blacks could occupy 5% of the housing in Arlington Heights based upon the cost of presently available housing of all types.

The Court however ignored the testimony of the plaintiffs' own witness, deVise, that 2,500 Blacks whose income would qualify for Lincoln Green, the proposed project, were also qualified for other housing in the Village of Arlington Heights which was in existence in 1970. deVise testified that 3,244 Blacks could afford to live in Arlington Heights based upon the housing supply in existence in 1970. Moreover, in his computations, he considered only people moving from house to house or apartment to apartment, not the possibility of Blacks moving from existing apartments in other communities to houses in Arlington Heights or Blacks moving from houses in other communities to apartments in Arlington Heights. We submit that this evidence clearly indicates that it has not been the zoning pattern of the Village which has kept Blacks from moving into the community.

We suggest that the finding of the trial judge that there was insufficient evidence to show discrimination by the defendants against racial minorities is dispositive of the whole controversy. The Court of Appeals in its opinion specifically found that the Village zoning policy was not administered in a discriminatory

manner and supported the District Court's finding that the Village was concerned with the integrity of the zoning plan. The trial court stated the basic issue was whether low-income workers have a constitutional right to low-rental housing, either where they work or elsewhere, and concluded that there is no such rule of law. The trial court's conclusion in this respect is of course well supported by the decisions of this Court and other Federal Courts throughout the country. *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 39 L. Ed. 2d 797; *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 36 L. Ed. 2d 16; *Lindsey* v. *Normet*, 405 U. S. 56, 31 L. Ed. 2d 36; *James* v. *Valtierra*, 402 U. S. 137, 28 L. Ed. 2d 678; *Palmer* v. *Thompson*, 403 U. S. 217, 29 L. Ed. 2d 438; *Acevedo* v. *Nassau County*, 500 F. 2d 1078; *Mahaley* v. *Cuyahoga Metropolitan Housing*, 500 F. 2d 1087; *Citizens Committee for Faraday Wood* v. *Lindsay*, 362 F. Supp. 651; *Lawrence* v. *Oakes*, 361 F. Supp. 432.

The Court of Appeals in reversing the trial court does not deal with that proposition, nor does it cite any authority which would give special privileges with respect to housing and zoning to low-income persons, regardless of race. It is implicit in its opinion however that low-income persons apparently do have such special privileges if there is a possibility that there will be a higher percentage of racial minorities in their number.

The trial court found, and the Court of Appeals recognized, that the Village's Comprehensive Plan had been generally systematically followed. The trial court found that the evidence indicated a serious damaging of the value of surrounding single-family homes, and the trial court concluded that the weight of the evidence proves that the defendants were motivated by a legitimate desire to protect property values and the integrity of the Village's zoning plan. The trial court concluded that this was not an arbitrary or capricious act in derogation of the plaintiffs' Fourteenth Amendment rights. These findings were supported by the evidence and should not be disturbed.

Northcross v. *Board of Education of Memphis,* 397 U. S. 232, 25 L. Ed. 2d 246; *United States* v. *79.95 Acres of Land,* 459 F. 2d 185, 187; *Davis* v. *Cities Service Oil Co.,* 420 F. 2d 1278, 1279.

The Court of Appeals nevertheless substituted its judgment for that of the trial court with respect to the facts. As this Court pointed out in the *Northcross* case, where, as here, the findings of the District Court were supported by substantial evidence, the Court of Appeals erred in substituting its own findings.

In reversing the findings of the trial court, the Court of Appeals offered no legal support for the proposition that a zoning ordinance, which is otherwise legitimate and well within the legislative discretion of the municipal body, is invalid because the result might be the exclusion of low-income persons, who in turn *might* be Black. The logic of this position would dictate that there can no longer be any single-family zoning district in any municipality if a developer seeks to build housing which he can show might be occupied by a greater percentage of a minority group than presently existed in that municipality. There is no basis in the Fourteenth Amendment or in any decision of this Court or any other court cited to support such a conclusion.

The Court of Appeals has failed to recognize the basic decisions of this Court in dealing with the questions at issue here. It has chosen to impose the "compelling interest" test to a legislative decision, which is clearly well within the range of legislative discretion. In its opinion the Court of Appeals totally ignores the basic holdings of this Court in a series of cases in which it has refused to classify housing as a fundamental right and has refused to apply the "compelling interest" test.

Most recently in the case of *Village of Belle Terre* v. *Boraas,* 416 U. S. 1, 39 L. Ed. 2d 797, the Court pointed out in a zoning case that limiting occupancy under a zoning ordinance involved no fundamental right guaranteed by the Constitution. The Court went on to say:

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 64 L.Ed. 989, 40 S.Ct. 560) and bears 'a rational relationship to a [permissible] state objective.' Reed v. Reed, 404 U.S. 71, 76."

Here, the protection of surrounding properties from depreciation and the preservation of the zoning ordinance are clearly permissible objectives.

In *Lindsey* v. *Normet,* 405 U. S. 56, 31 L. Ed. 2d 36, the Court held that social importance was not the critical determinate for subjecting legislation to strict scrutiny. The Court recognized the importance of decent, safe and sanitary housing, but it went on to point out that there was no constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy any particular dwellings. The Court concluded that, absent constitutional mandate, the assurance of adequate housing is a legislative not a judicial function. 405 U. S. 56, 74.

This Court in *James* v. *Valtierra,* 402 U. S. 137, 28 L. Ed. 2d 678, held that a legal requirement may have a greater impact upon the poor or other minority, but that does not render the requirement invalid under the Fourteenth Amendment.

To the same effect was this Court's decision in *San Antonio Independence School District* v. *Rodriguez,* 411 U. S. 1, 36 L. Ed. 2d 16, where the Court specifically held that there was no fundamental right to housing guaranteed by the Constitution. It cited *Lindsey* in pointing out that there was no constitutional mandate to assure adequate housing. The Court at 411 U. S. 1, 43, said:

> "As in the case of housing, the central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some

> compelling state interest. See also, Jefferson v. Hackney, 406 U.S. 535, 32 L.Ed.2d 285, 92 S.Ct. 1724 (1972); Richardsen v. Belcher, 404 U.S. 78, 30 L.Ed.2d 231, 92 S.Ct. 254 (1971)."

In the *Rodriguez* case, the Court moreover rejected the concept that housing involved a suspect class.

These decisions are well summarized in the case of *Lawrence* v. *Oakes*, 361 F. Supp. 432, decided by a three judge panel in the District Court of Vermont. The Court there pointed out that, under the decisions of the United States Supreme Court, the compelling interest test is not to be applied in cases similar to that at bar. At page 440, the Court said:

> "At the outset, we reject plaintiff's argument that we should adopt the compelling interest test, a test that has been invoked by the Supreme Court only in cases in which the challenged provision impinged on a 'fundamental right,' or in which the class involved was a suspect class."

It is clear, therefore, that under the decisions of this Court, the right to housing although socially of great significance, does not involve a fundamental constitutional right, and the Court of Appeals' application of the "compelling interest" test is inappropriate and erroneous.

That Court's further reliance upon its own decision in the case of *Clark* v. *Universal Builders, Inc.*, 401 F. 2d 324, is also misplaced. The *Clark* case was decided on the question of the propriety of granting a directed verdict for the defendants at close of plaintiffs case. Moreover, that case involved not municipal action pursuant to an undoubted grant of police power, but involved actions by private parties taking advantage of a dual market in real estate with respect to price. The Court held that, when allegations were made which set up a prima facie case of two prices dependent upon race for housing in the same market, there was a violation of the Civil Rights Act. No such factual situation exists here. There is no evidence to indicate that blacks

do not have equal access to housing in Arlington Heights at the same price as do whites.

The fact that more blacks than whites might be affected by refusing to rezone does not render the zoning violative of the Fourteenth Amendment. In *Palmer* v. *Thompson*, 403 U. S. 217, 29 L. Ed. 2d 438, this Court held that the closing of all public swimming pools by a municipal authority was not unconstitutional, notwithstanding the fact that Negroes would be affected to a greater extent than whites. The Court concluded with respect to the record that "it shows no state action affecting blacks differently from whites." Here, of course, the fact that the plaintiffs argued that the Village's action would have a disproportionate effect on blacks does not render a legitimate zoning decision a violation of the Fourteenth Amendment.

In the recent case of *Milliken* v. *Bradley*, 418 U. S. 717 (1974), 41 L. Ed. 2d 1069, this Court in a school segregation case held that racial imbalance in itself is not to be equated with a constitutional violation calling for a remedy. It indicated that the fact that Detroit schools were segregated did not require an inter-district plan outside the corporate limits, absent any showing that the suburban school district had in fact discriminated. Thus, the fact that Arlington Heights is located in the Chicago metropolitan area, which the Court of Appeals described as segregated, does not impose an affirmative duty upon the Village of Arlington Heights to change its otherwise valid Zoning Ordinance, absent a showing of discrimination by Arlington Heights in the administration of an ordinance clearly valid on its face. *Milliken* v. *Bradley*, 418 U. S. 717, 41 L. Ed. 2d 1069, 1091.

The fact that enforcement of municipal ordinances might have a greater impact on the poor of course does not render the ordinance invalid under the Equal Protection Clause. *James* v. *Valtierra*, 402 U. S. 137, 28 L. Ed. 2d 678; *English* v. *Town of Huntington*, 448 F. 2d 319, 324; *Ybarra* v. *City of Town of Los Altos*, 503 F. 2d 250 (1974).

The decision of the Court of Appeals here is inconsistent with the holdings of several other circuits. In *Ybarra* the Court of Appeals for the Ninth Circuit refused to apply the "compelling interest" test in a case challenging a large lot zoning ordinance on the grounds it excluded Mexican Americans. The trial court had found that the ordinance prevented poor people from living in Los Altos and that if Mexican Americans did not live there, it was because of poverty. The Court at page 253 said: "We agree that discrimination against the poor does not become discrimination against an ethnic minority merely because there is a statistical correlation between poverty and ethnic background." The Court based its decision on this Court's opinion in *Rodriguez.*

In the very recent case of *Construction Industry Association of Sonoma County* v. *City of Petaluma,* No. 74-2100, decided August 13, 1975 by the Court of Appeals for the Ninth Circuit, that Court reversed the trial court and rejected the concept that an allegedly exclusionary zoning ordinance was a violation of the Fourteenth Amendment. At page 11 of the slip opinion, the Court said:

> In attacking the validity of the Plan, appellees rely heavily on the district court's finding that the express purpose and the actual effect of the Plan is to exclude substantial numbers of people who would otherwise elect to move to the City. 375 F. Supp. at 581. The existence of an exclusionary purpose and effect reflects, however, only *one* side of the zoning regulation. Practically all zoning restrictions have as a purpose and effect the *exclusion* of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose.[11] We must determine further whether the *exclusion* bears any rational relationship to a *legitimate state interest.* If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation.

In the case of *Acevedo* v. *Nassau County,* 500 F. 2d 1078 (1974), the Second Circuit was considering the liability of Nassau County, New York, for abandoning plans for constructing low-income family housing. At page 1080, the Court noted:

> "Appellees have no constitutional or statutory duty to provide low income housing. There is no 'constitutional guarantee of access to dwellings of a particular quality.' Lindsay v. Normet, 405 U.S. 56, 74 (1972)."

The Court went on to say at page 1082:

> "The Fair Housing Act does not impose any duty upon a governmental body to construct or to 'plan for, approve and promote' any housing."

In the case of *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F. 2d 1087 (1974), the Sixth Circuit Court of Appeals held that the failure of Cleveland suburbs to enter into a cooperation agreement for the construction of federally assisted housing did not violate federal civil rights laws or the United States Constitution. The Court relied heavily on *Palmer* v. *Thompson,* 403 U. S. 217. At page 1093, it said:

> In the present case the failure of the suburbs to provide low-rent housing affected alike both low-income blacks and whites. There may have been a greater impact on the blacks, but that, under Palmer, is not sufficient to establish a constitutional violation.
>
> In Lindsey v. Nomet, 405 U.S. 56 (1972), the Court held that no one has a constitutional right to adequate housing. Since a person has no right to public housing in his own city, it follows that he has no such right in a municipality in which he does not reside.
>
> See also Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980, rehearing denied, 397 U.S. 1059 (1970), on neutral action of referendum.

The Court also cited *Citizens Comm. for Faraday Wood* v. *Lindsay*, 362 F. Supp. 651 (S. D. N. Y. 1973) and its reliance on *Palmer* and *Valtierra*.

In the case of *Warth* v. *Seldin*, ... U. S. ..... 45 L. Ed. 2d 343, decided June 25, 1975, this Court denied standing of certain petitioners to attack a zoning ordinance which they contended was exclusionary. The Court however recognized that it could be economics rather than discriminatory zoning which denied access to housing in the municipality in question. The Court noted at page 359:

> "Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequences of the economics of the area housing market, rather than of respondents' assertedly illegal acts."

It must be concluded that, as this Court has repeatedly pointed out, access to housing does not involve a fundamental constitutional right which requires the application of the "compelling interest" test in determining the validity of a zoning ordinance which would allegedly limit access to housing by minority groups because statistically they have a greater percentage than the majority group in the low-income class. The Court of Appeals' conclusion in this regard is manifestly erroneous in light of the repeated holdings of this Court in *Belle Terre, Rodriguez, Lindsey, Palmer, James,* and *Warth,* and Court of Appeals' decisions in *English, Ybarra,* and *City of Petaluma.* The Court's opinion thus is a patent departure from the decisions of this Court of other Courts of Appeal throughout the country and should not be allowed to stand.

II.

THE PLAINTIFFS FAILED TO OVERCOME THE PRESUMPTION OF VALIDITY ATTACHING TO THE ZONING ORDINANCE. THE LEGISLATIVE JUDGMENT WAS CLEARLY REASONABLE AND THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE MUNICIPAL LEGISLATIVE BODY.

The Court of Appeals conceded in its opinion that the trial court was not erroneous in concluding that the defendants were concerned with the integrity of the Village's zoning plan. It also concedes that decisions that affect those in the lower income bracket more than others are not thereby rendered racially discriminatory. The Court recognizes that this Court is *James* v. *Valtierra,* 402 U. S. 137, has held that racial disparity alone does not amount to racial discrimination. The Court however, as we have indicated above, chooses wrongfully to apply the "compelling interest" test to declare an otherwise valid zoning restriction to be repugnant to the Fourteenth Amendment.

Nowhere in its opinion does the Court of Appeals suggest that the Village exercised its zoning powers with respect to the land in question in a discriminatory manner. Its opinion totally ignores the basic rules that this Court has laid down in the consideration of zoning questions. The Court nowhere cites or attempts to distinguish the controlling cases of *Village of Belle Terre* v. *Boraas,* 416 U. S. 1, 39 L. Ed. 2d 797, and *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, cited below by the defendants. These two cases are clearly dispositive of the zoning questions presented.

This case should be nothing more than a garden-variety zoning controversy. Although the plaintiffs have introduced the issue of racial discrimination and the Court of Appeals decided the issue on Fourteenth Amendment grounds, it is obvious that the only real question is the reasonableness of the zoning restriction, which both on its face and in fact is not aimed at any racial

minority. The record is absolutely clear that, based upon sound zoning principles, the retention of a single-family classification on the subject property, which is surrounded by single-family homes and a school development, is a legitimate and valid exercise of the legislative discretion vested in the local authorities.

The law is well established that a zoning ordinance is presumptively valid, and the party assailing its validity must show by clear and convincing evidence that it is invalid. This fundamental rule was adopted by this Court in the landmark decision of *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303. In that case this Court specifically held that, if the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be controlling. At page 388, the Court said:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judment must be allowed to control. Radice v. New York, 264 U.S. 292, 294, 68 L.ed. 690, 694, 44 Sup.Ct.Rep. 325."

In the more recent decision of *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 39 L. Ed. 2d 797, this Court summarized its broad holding in the *Euclid* case. At page 5 the Court said:

> The main thrust of the case in the mind of the Court was in the exclusion of industries and apartments and as respects that it commented on the desire to keep residential areas free of "disturbing noises"; "increased traffic"; and hazard of "moving and parked automobiles"; the "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities." Id., at 394, 71 L Ed 303, 54 ALR 1016. The ordinance was sanctioned because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary. Id., at 388, 71 L Ed 303, 54 ALR 1016.

The Court in *Belle Terre* at 416 U. S. 1, at page 5, referred to *Berman* v. *Parker*, 348 U. S. 26, 99 L. Ld. 27, in noting the broad scope of the police power, indicating: "We refused to limit the concept of public welfare that may be enhanced by zoning regulations."

In *Belle Terre* the Court was concerned with an attack involving equal protection rights under the Fourteenth Amendment. As here, the District Court had upheld the constitutionality of the ordinance, but the Court of Appeals had reversed. This Court specifically rejected the claim that fundamental constitutional rights were involved in a zoning ordinance which restricted occupancy of single-family dwellings. As here, it was charged that the ordinance bars people who were uncongenial to the present residents and that it expressed the social preferences of the residents for more congenial groups. It was urged that the ordinance was contrary to an open, egalitarian and integrated society. 416 U. S. 1, 7. This Court at pages 7 and 8 of its opinion used language which is particularly appropriate and diespositive to the case at bar. It said:

> It involves no procedural disparity inflicted on some but not on others such as was presented by Griffin v Illinois, 351 US 12, 100 L Ed 891, 76 S Ct 585, 55 ALR2d 1055. *It involves no "fundamental" right guaranteed by the Constitution,* such as voting, Harper v Virginia Board, 383 US 663, 16 L Ed 2d 169, 86 S Ct 1079; the right of association, NAACP v Alabama, 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163; the right of access to the courts, NAACP v Button, 371 US 415, 9 L Ed 2d 405, 83 S Ct 328; or any rights of privacy, cf. Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678; Eisenstadt v Baird, 405 US 438, 453-454, 31 L Ed 2d 349, 92 S Ct 1029. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be " 'reasonable, not arbitrary' " (quoting Royster Guano Co. v Virginia, 253 US 412, 415, 64 L Ed 989, 40 S Ct 560) and bears "a rational relationship to a [permissible] state objective." Reed v Reed, 404 US 71, 76, 30 L Ed 2d 225, 92 S Ct 251. (Emphasis added.)

Echoing *Euclid's* determination that single-family areas may be constitutionally protected, the Court at page 9 noted:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a

> land-use project addressed to family needs. This goal is a permissible one within Berman v Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

The Illinois Supreme Court has of course universally adhered to the proposition that the zoning ordinance is presumptively valid and the party assailing its validity must show by clear and convincing evidence that it is invalid. If there is any room for a reasonable difference of opinion, the court will not substitute its judgment for that of the legislative body. *Exchange National Bank* v. *County of Cook,* 25 Ill. 2d 434, 439; *Trendel* v. *County of Cook,* 27 Ill. 2d 155, 161; *Bennett* v. *Chicago,* 24 Ill. 2d 270, 273; *Sutter* v. *Village of Mundelein,* 27 Ill. 2d 589, 593.

The Supreme Court of Illinois in the recent case of *LaSalle National Bank* v. *City of Evanston,* 57 Ill. 2d 415, sustained the City of Evanston's Zoning Ordinance which, like the present ordinance, restricted residential density as applied to the subject property. The Court at page 428 of its opinion said:

> "The law governing the disposition of contentions challenging zoning classifications has been set forth in numerous decisions. As stated in *Exchange National Bank of Chicago* v. *County of Cook,* 25 Ill.2d 434, 439-40, 'It is always presumed, in an attack upon an ordinance, that the enactment is valid, and the burden of proving its invalidity falls upon the one who attacks the ordinance. (*Jacobson* v. *City of Evanston,* 10 Ill.2d 61.) Before a court will intervene it must be established by clear and convincing evidence that the ordinance, as applied to plaintiffs, is arbitrary and unreasonable and has no substantial relation to the public health, safety, or welfare. These rules are based upon a recognition that zoning is primarily a legislative function, subject to court review only for the purpose of determining whether the power, as exercised, involves an undue invasion of private constitutional rights without a reasonable justification in relation to public welfare. (*People ex rel. Joseph Lumber Co.* v. *City of Chicago,* 402 Ill. 321; *Morgan* v. *City of Chicago,* 370 Ill. 347.) Where it appears, from all the facts, that room exists for a difference of opinion concerning the reasonableness of a classification, the legislative judgment must be conclusive. (*Krom* v. *City of Elmhurst,* 8 Ill.2d 104.)"

The Illinois Supreme Court incidentally in the *LaSalle National Bank* case cited *Belle Terre* as authority.

No serious attempt was made by the plaintiffs to attack the reasonableness of the Zoning Ordinance on traditional zoning grounds. The Court of Appeals clearly did not attempt to make its determination in terms of normal zoning criteria. It in fact conceded that the ordinance would be valid if the "compelling interest" test was not to be applied. We have demonstrated above that the "compelling interest" test is not applicable because access to housing, even for low-income people, is not a fundamental constitutional right. It is clear that the plaintiffs failed to overcome the presumption of validity attaching to the Zoning Ordinance of the Village of Arlington Heights. The legislative judgment of the Village officials must clearly prevail under the holdings of this Court in *Euclid* and in *Belle Terre* and the holdings of the Illinois Supreme Court.

We respectfully suggest that the Zoning Ordinance in question was a reasonable exercise of the unquestioned legislative authority vested in the Village of Arlington Heights. The specious claim that the ordinance was racially discriminatory, was clearly not supported by the evidence and contrary to the factual findings of the trial court who heard all the witnesses and carefully examined all the evidence. We suggest that the factual situation is not really in doubt. Absent the Fourteenth Amendment claim, there can be no question but that the zoning restriction here challenged would stand.

We suggest that there is no basis in the Fourteenth Amendment or the decisions of this Court which would require the

valid legislative decisions of the local municipal body to be set aside merely to permit occupancy by a low-income group that might in fact have a higher percentage of minority members than the percentage already residing in the community. To rule otherwise would destroy the basis of zoning law in this country and elevate racial considerations beyond the legitimate needs of the police power.

III.

THE PLAINTIFFS LACK STANDING TO BRING THIS ACTION.

The Village filed a motion to strike the complaint and dismiss the cause, alleging in part that the plaintiffs had no standing to bring this action in the first instance. A predecessor judge denied the motion, and the trial court heard the matter on its merits. (B3) The trial court found however that this was not properly a class action.

Two Black plaintiffs who were non-residents of Arlington Heights testified. One resided in another Chicago suburb and the testimony failed to establish that he and his family were eligible by reason of income to reside in the Lincoln-Green project. The other, as the trial court had noted, chose to move to the south side of Chicago in order to buy a two-flat apartment building. The trial court concluded that the individual plaintiffs did not represent a definable and manageable class. One intervenor, Eluteria Maldonado, was a Mexican American who resided in Arlington Heights and therefore clearly could not have been denied the right to live in the Village because of the Village's zoning pattern. The trial court noted, with respect to the Metropolitan Housing and Development Corporation, "the plaintiff corporation acquires no different status than any other corporation merely because it has been created for the purpose of developing housing for low-income tenants."

The Court of Appeals did not deal in any manner with the question of standing. It is clear however that this Court's recent

opinion in the case of *Warth* v. *Seldin*, ... U. S. ....., 45 L. Ed. 2d 343, is dispositive of the question and clearly indicates that none of the plaintiffs here had standing to contest the Village's action. The Court of Appeals' decision was based solely on the Fourteenth Amendment. It made no decision with respect to the alleged violations of the Civil Rights Act or the Fair Housing Act. The trial court had found that no violations of either statute or of the Fourteenth Amendment had taken place.

It should be noted that the not-for-profit intervenor corporation (Northwest Opportunity Center) has no standing under the doctrine of *Warth* v. *Seldin*. The non-resident Black plaintiffs were not members of a class and clearly have no standing based upon their own factual situation. Maldonado was clearly not the victim of denial of equal protection because she was residing in the Village, and thus had not been "zoned out"; Metropolitan Housing, the other corporate plaintiff, had an interest which was contingent upon rezoning and upon the ability to secure 236 financing. The trial court specifically found that this latter corporation lacked the present capacity to carry out its proposed project. (B6, B7) This finding of fact was in no way disputed by the Court of Appeals which chose not to deal with this aspect of the situation. The actual owner of the property who might have had standing was not a party to the case.

The law is clear in Illinois that a contract purchaser whose contract is conditioned on rezoning, as is here the case, has no standing to challenge the validity of a zoning ordinance. *Clark Oil & Refining Corp.* v. *Evanston*, 23 Ill. 2d 48. This rule of law is even more compelling when, as here, the plaintiffs' rights were contingent not only on zoning but on securing financing under a program which no longer exists. Thus, the whole proposal may well be moot.

With respect to the Fourteenth Amendment question, it should be noted that the Court of Appeals specifically refused to set aside the trial court's finding that the Village had not dis-

criminated in the application of its zoning ordinance in denying the rezoning requested for the subject property. The Court specifically noted that the evidence does not require the conclusion that, had the proposed development been purely commercial, the requested change would have been granted. (A4) Thus, the equal protection argument of the Fourteenth Amendment was specifically rejected not only by the trial court, but the Court of Appeals as well.

We suggest moreover that, as noted by the trial court, the corporate plaintiff acquires no different status than any other corporation merely because it has been created for the purpose of developing housing for low-income tenants.

The application of the Fourteenth Amendment to a corporation in order to prevent racial discrimination is improper under the present factual situation. The corporation has no racial identity. It is conceded that it was treated exactly the same as any other property owner in similar circumstances would have been treated. This Court has frequently held that the application of the Fourteenth Amendment to corporations under such circumstances is highly suspect. See, for example, the dissenting opinion of Mr. Justice Douglas in *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 576; *Western Turf Assn.* v. *Hyman Greenberg*, 204 U. S. 359, 51 L. Ed. 520; and *Selover Bates & Co.* v. *Walsh*, 226 U. S. 112, 57 L. Ed. 146.

We believe that this Court should reverse the Court of Appeals on the merits. We suggest however that under the doctrine of *Warth* v. *Seldin*, these plaintiffs were not entitled to be in the Federal Court in the first instance and that our motion to dismiss, which was acted upon by the District Court on October 3, 1972, would undoubtedly have been granted had this Court's decision in the *Warth* case then been available to the trial judge.

CONCLUSION.

This Court should grant the Petition for Writ of Certiorari because the opinion of the Court of Appeals is clearly contrary to the Court's repeated holdings that the fact that legislation otherwise valid may have a disproportionate impact on the poor, including racial minorities, does not thereby render such legislation discriminatory governmental action. The zoning restriction challenged in the instant case would inevitably screen out some persons who could not afford housing in Arlington Heights, but that fact alone does not render the zoning restriction invalid or unconstitutional under the Fourteenth Amendment. It affects Blacks and Whites as well. The Court of Appeals erroneously has applied the "compelling interest" test in an area where this Court has held that such a test is improper. Moreover, the plaintiffs lacked standing under *Warth* v. *Seldin*.

We believe that the Court has already answered the question raised here by its opinions in *Palmer*, *Rodriguez* and *Belle Terre*, but the Court of Appeals has ignored those answers in its opinion here. If this Court concurs that these cases are in fact controlling, it should grant the writ because the Court of Appeals for the Seventh Circuit has in fact rendered a decision on an extremely important and far-reaching question in conflict with the decisions of this Court and other Courts of Appeal. If the Court believes that the question raised here has not in fact already been answered, it is a vitally important question of federal law that should be settled by this Court.

The holding of the Court of Appeals ignores the clear and continuing rule laid down by this Court in *Euclid* and *Belle Terre* and universally applied—the basic and unyielding principle that under the Equal Protection Clause, legislative solu-

tions must be respected if they in some way advance a legitimate state interest. That respect for the legislative judgment is paramount to the administration of justice in a democratic society.

Respectfully submitted,

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APPENDIX A.

No. 74-1326.

UNITED STATES COURT OF APPEALS,
Seventh Circuit.

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, an Illinois not-for-profit Corporation, et al.,
Plaintiffs-Appellants,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation, et al.,
Defendants-Appellees,

NORTHWEST OPPORTUNITY CENTER, INC., and ELUTERIA D. MALDONADO,
Plaintiffs-Appellants.

Argued Sept. 13, 1975 Decided June 10, 1975.

Before FAIRCHILD, Chief Judge, and SWYGERT and SPRECHER, Circuit Judges.

SWYGERT, Circuit Judge.

The question in this case is whether the Village of Arlington Heights' refusal to rezone a piece of property in order to permit the construction of a housing development for low and moderate income persons violates plaintiffs' constitutional rights.

Plaintiff Metropolitan Housing Development Corporation is an Illinois non-profit corporation organized in 1968 for the purpose of developing low and moderate income housing in the Chicago metropolitan area. It was selected by the Clerics of St. Viator, a Catholic religious order, to develop the land in question

for low and moderate income housing. The Clerics have title to eighty acres of land in Arlington Heights, a suburb northwest of Chicago, on part of which is situated their novitiate and high school. The land they wish to make available is a vacant fifteen acres in the southeast corner of the acreage. This property is bounded on the east by single family homes on the south by Euclid Avenue which has single family homes, on the side opposite St. Viator's property, and on the west and north by undeveloped St. Viator property. The Clerics entered into a ninety-nine year lease and sale agreement with Metropolitan Housing which provided that the land was to be developed for subsidized housing. The price was to be $300,000.

Metropolitan Housing proposed to use the land for a 190 unit townhouse development to be called "Lincoln Green." Under the plan more than sixty percent of the property was to be maintained as open space. The financing was to be provided pursuant to section 236 of the National Housing and Urban Development Act of 1968, 12 U.S.C. §1715z-1. These units would have been the only subsidized housing in Arlington Heights despite a great demand for such housing in that area.

The fifteen acres on which Lincoln Green was to be situated, like the remainder of the St. Viator property, has always been zoned R-3, single family; in fact, all of the land surrounding the property is zoned R-3. In order to build this development, however, the fifteen acres would have to be rezoned to R-5, multifamily. Since 1959 the Village has had its "Comprehensive Plan" that provides that an area should be zoned R-5 only if it represents a "buffer" zone or transition between single family zoning and commercial, industrial, or other high intensity uses.

Metropolitan Housing applied for a zoning change. As the district court found after trial, Metropolitan Housing "took the necessary administrative steps to obtain rezoning and made various changes in its proposal in an attempt to satisfy various objections which were raised by the Village's Plan Commission." Metropolitan Housing presented studies showing that Lincoln

Green would not cause major traffic problems and would make a net contribution to the Village in terms of taxes. Still, after holding public hearings, the Plan Commission recommended against the rezoning and on September 28, 1971 the Board of Trustees of the Village voted six to one to deny the request. The apparent reason for the rejection was that the property was in the middle of a completely single family area and would not act as a buffer zone as required by the Comprehensive Plan.

This suit was then instituted by Metropolitan Housing and the individual plaintiffs who seek to represent moderate income minority members who work or desire to work in Arlington Heights but cannot find decent housing there that they can afford. (Northwest Opportunity Center, another not-for-profit corporation, and Eluteria Maldonado have been allowed to intervene as plaintiffs.) The complaint alleges that the refusal to rezone perpetuated segregation and denied Metropolitan Housing the right to use its property in a reasonable manner in violation of the Fourteenth Amendment, the Civil Rights Act of 1866 (52 U.S.C.A. §§ 1981 and 1982), the Civil Rights Act of 1871 (42 U.S.C. § 1983), and the Fair Housing Act of 1968 (42 U.S.C. § 3601, et seq.). The relief requested is a declaratory judgment invalidating the Arlington Heights zoning ordinance as applied to the subject property and an injunction restraining defendants, among whom are the individual Trustees of the Village, from preventing or interfering with the development of the housing proposed by Metropolitan Housing.

After a trial on the merits the district court denied the plaintiffs any relief. It found that there were good faith reasons for the refusal to rezone and that the decision did not have a racially discriminatory effect. It held that plaintiffs were attempting to extend the Fourteenth Amendment beyond its outer limits. We disagree and reverse.

I.

[1] The first contention raised by plaintiffs is that they have been denied equal protection of the law in that the Village's zoning policy has been administered in a discriminatory manner. *See* Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). They claim that had Lincoln Green been a commercial development the zoning change would have been granted. We agree that this contention, if proved, would state a claim entitling plaintiffs to the relief sought. The district court, however, found that this claim was not proved, and we cannot say that the finding was clearly erroneous.

The evidence on this point relates to the results of other requests for zoning changes to R-5. Plaintiffs contend that sixty zoning changes to R-5 were granted to commercial developers and these changes show that the policy of using R-5 property only as a buffer zone had not been followed. Thus it is argued that the buffer zone explanation is really a "sham" excuse offered only because the Village did not wish to have a housing project for low and moderate income families.

The evidence, however, relating to both grants and denials of requested zoning changes does not require the conclusion that had Lincoln Green been a proposed commercial development the variance would have been granted despite the fact that the development would not serve as a buffer zone. Plaintiffs' own expert agreed that the Village had conformed to its Comprehensive Plan for approximately two-thirds of these sixty zoning changes. His report listed fifteen relevant instances of failure to adhere to the stated policy. Defendants' witness disputed this conclusion in regard to many of these and offered explanations for the others. Our review indicates that in only four relevant instances were there clear violations of the buffer zone policy and in another two instances a questionable violation. This must be balanced against the defendants' evidence concerning the zoning change refusals. That evidence shows that prior to the

Lincoln Green rejection there were two proposed changes rejected at least in part on the basis of the buffer zone policy and another four rejections which might have been on the basis though this was not stated. There were also two proposals that were withdrawn after the Plan Commission had recommended their rejection at least partly on the basis of the apartment policy. A third withdrawal after a rejection recommendation might have been for the same reason. Subsequent to the ruling on Metropolitan Housing's proposal, the Plan Commission recommended the rejection of two other requests on the ground of the buffer zone policy (one of these was then withdrawn and the other had not been passed upon by the Village Board at the time of trial).

The inference that can be drawn from this evidence is that Arlington Heights has been applying its buffer zone policy in considering requests for zoning changes thought not with absolute consistency. The evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner. While more detailed factual findings concerning these zoning changes woud have been helpful, an examination of the record and exhibits indicates that the district court's finding that defendants were concerned with "the integrity of the Village's zoning plan" is not clearly erroneous.

II.

Plaintiffs also argue that even if the buffer zone policy has been properly applied the refusal to rezone the land has a racially discriminatory effect, and perpetuates Arlington Heights' segregated character. Regardless of the Village Board's motivation, if this alleged discriminatory effect exists, the decision violates the Equal Protection Clause unless the Village can justify it by showing a compelling interest. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1963).

[2] The real question is whether there is a racially discriminatory effect for equal protection purposes. It is true that a greater percentage of blacks than whites are affected by the Village's decision since a greater percentage of blacks than of whites are in the low and middle income categories that are eligible for this proposed section 236 housing development. (Blacks comprise forty percent of the eligible prospective tenants.) But this disparity does not necessarily mean that the zoning change refusal had the type of racially discriminatory effect that requires the invocation of the compelling state interest tests. As indicated, the "class" that is affected by the Village's action is composed of individuals with low and moderate incomes. Racial minorities constitute a higher percentage of this class than they do percentagewise of the population in general within the Chicago metropolitan area. This fact alone, however, does not make decisions that affect those in the lower income bracket more than others racially discriminatory governmental actions. English v. Town of Huntington, 448 F.2d 319, 324 (2d Cir. 1971). Governmental action having a disproportionate impact on a class composed of an extremely high percentage of racial minorities might be classified as discriminatory in an equal protection sense. But that is not this case. Indeed, this narrow question has, we think, impliedly been answered by the Supreme Court in James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed2d 678 (1971). *James* was concerned with a provision of the California Constitution that required state developed low-rent housing projects to be approved only upon a referendum vote. The briefs presented to the Court showed that at least some of the defeated housing proposals were in areas with a disproportionately high minority population and that racial minorities would have benefited more from the low income housing. Yet, the Supreme Court explicitly rejected the contention that the provision created a racial distinction that is subject to strictest scrutiny:

> The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. 402 U.S. at 141, 91 S.Ct. at 1333.

Accordingly, *James* supports our analysis that racial disparity alone as its relates to the housing project under consideration does not amount to racial discrimination.

III.

[3] It is argued on behalf of plaintiffs that in the type of situation before us an analysis of racial discrimination must, however, extend further. *See* United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974). The impact of the Village's refusal to rezone "must be assessed not only in its immediate objective but its historical context and ultimate effect." Kennedy Park Homes Association v. City of Lackawanna, New York, 436 F.2d 108, 112 (2d Cir. 1970).

The instant case reflects the unfortunate fact that historically the Chicago metropolitan area has been segregated in terms of housing. As we recently said in Clark v. Universal Builders, Inc., 501 F.2d 324, 334-35 (7th Cir. 1974), "Nor do we think it beyond the strictures of judicial notice to observe that there exists in Chicago and its environs a high degree of racial residential segregation." More specifically, the population of Arlington Heights in 1970 was 64,884, but only twenty-seven residents were black.[1] The four-township northwest Cook County area, of which Arlington Heights is a part, had a population increase from 1960 to 1970 of 219,000 people, but only 170 of these were black.[2] Indeed, the percentage of blacks in this area

1. According to statistics of plaintiffs' expert, demographer and urbanologist Pierre de Vise, Arlington Heights is the most residentially segregated community in the Chicago metropolitan area among municipalities with more than fifty thousand residents.

2. The impact of this statistic can be fully appreciated only in the context of the shift in employment opportunities during that same period. While the City of Chicago lost 230,000 jobs, the number of

actually decreased over this ten-year span while the percentage of the population in the entire Chicago metropolitan area that was black increased from fourteen percent to eighteen percent.

The ultimate effect of the Village's decision is, in all probability, that no section 236 housing will be built in Arlington Heights since plaintiffs were unable to find an economically feasible and suitable alternative site. Consequently a development for which blacks represent forty percent of the eligible applicants will not be built. Parenthetically, it must be noted that based solely on the cost of presently available housing of all types in the Chicago area, blacks would occupy five percent of the housing in Arlington Heights. We have no doubt that if Lincoln Green were built, it, unlike the rest of the Village, would be an integrated community. Though the building of this project might have only minimal effects in terms of alleviating the segregative housing problem for the entire Chicago area, it might well result in increasing Arlington Heights' minority population by over one thousand percent. What is even more crucial is that this suburb has not sponsored nor participated in any low income housing developments, nor does the record reflect any such plans for the future. Realistically, Lincoln Green appears to be the only contemplated proposal for Arlington Heights that would be a step in the direction of easing the problem of defacto segregated housing. Thus the rejection of Lincoln Green has the effect of perpetuating both this residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem.

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jobs in the four-township Arlington Heights area rose from 100,000 to 200,000. Blacks, however, have not been able to take full advantage of these job opportunities. In 1970 only 137 of the 13,000 people who worked in Arlington Heights were black. Part of the explanation for this is that many black workers have been unable to find housing they can afford in Arlington Heights. A study issued by the Cook County Office of Economic Opportunity indicated that based on its survey almost all the black workers in Arlington Heights resided in Chicago. Moreover, the report stated that one of the main problems Arlington Heights' employers faced in hiring minorities was the lack of adequate housing within a reasonable distance of their plants.

[4] The defendants' answer is that even if the refusal to rezone does have this effect it cannot be deemed a "discriminatory" effect. Since no direct action attributable to Arlington Heights created the segregated housing pattern, the municipality argues that it has no affirmative duty to alleviate the problem. We do not agree.

Merely because Arlington Heights did not directly create the problem does not necessarily mean that it can ignore it. In Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974), we, in effect, required that a builder forego "market prices" for homes built in black areas because the inflated "market prices" were a result of the segregated housing situation that could not simply be ignored. The builder could not "exploit" the situation even though he was in no way responsible for the discrimination that created the problem. To do so was itself an act of discrimination prohibited by 42 U.S.C. § 1982.

[5] In the instant case Arlington Heights has been ignoring what is essentially the same basic problem. Indeed, it has been exploiting the problem by allowing itself to become an almost one hundred percent white community. The Lincoln Green proposal represents an opportunity to help reverse this trend both in the entire Chicago area and more dramatically in the composition of the Village itself. Yet defendants argue that the Village need not consider such factors and that we should ignore them in determining whether there is a discriminatory effect in this case. But we cannot ignore segregation. This much is evident from Clark in terms of section 1982 and the Thirteenth Amendment and we think the principle is applicable to the Fourteenth Amendment in this case. *Cf.* United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida, 493 F.2d 799, 810-811 (5th Cir 1974). Because the Village has so totally ignored its responsibilities in the past we are faced with evaluating the effects of governmental action that has rejected the only present hope of Arlington Heights making even a small contribution toward eliminating the pervasive problem of segregated housing. We therefore hold that under the facts of this case

Arlington Heights' rejection of the Lincoln Green proposal has racially discriminatory effects. It could be upheld only if it were shown that a compelling public interest necessitated the decision.

IV.

The argued justifications for the decision are based on two grounds: maintaining integrity of the zoning plan (buffer policy) and protecting neighboring property values. Neither of these can be deemed "compelling."

As we have already indicated, the Village has not even been consistent in applying its zoning plan when considering requests for zoning changes to R-5. Moreover, even if a municipality's desire to limit multifamily dwellings to instances in which they might serve as a transitional buffer zone could ever be a compelling interest, it is certainly not in this case. Lincoln Green will not be a highrise development, but merely a cluster of two-story townhouses no higher than the surrounding single family homes. As noted by two dissenting members of the Arlington Heights Plan Commission, in terms of density, architecture and most other characteristics, such townhouses are more similar to R-3 dwellings than R-5 buildings. The planning rationale behind the buffer zone policy has only minimal applicability to this type of lowrise, open-space development. It is not a sufficiently compelling interest to justify the racially discriminatory effect.

Nor do we find that the decision can be supported by the fact that neighboring property values might be diminished by as much as five to ten percent as asserted by defendants' witness. It is questionable whether this purely private monetary consideration could be a compelling interest. In this instance it is not. The explanation for this diminution in value is that the single family property owners had relied on the integrity of the Comprehensive Plan and Lincoln Green would be a variance from the expected totally single family neighborhood. Not only have there been other variances in Arlington Heights, but the neighboring residents certainly could not expect that the zoning plan would

always be adhered to even when a racially discriminatory effect would be the result.

Since no compelling justification for the decision exists, the refusal to grant the requested zoning change is a violation of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the judgment of the district court is reversed and this cause is remanded for entry of judgment in accordance with this opinion.

FAIRCHILD, Chief Judge (dissenting).

I agree that the district court's finding that defendants' refusal to grant plaintiffs a zoning variance was motivated by valid planning considerations is not clearly erroneous. I also agree that, if plaintiffs establish that the Village's enforcement of its zoning scheme makes construction of housing for low and moderate income individuals not reasonably possible, the refusal perpetuates racial segregation and, absent compelling governmental justification, the plaintiffs would be entitled to the relief they seek. United States v. City of Black Jack, Missouri, 508 F.2d 1179, 1186 (8th Cir. 1974).

The majority states that "[t]he ultimate effect of the Village's decision is, in all probability, that no section 236 housing will be built in Arlington Heights since plaintiffs were unable to find an economically feasible and suitable alternative site." I cannot agree that the record supports such a conclusion. The district court found that the Village "[has] zoned 60 tracts for the R-5 use and some of it is still vacant and available to plaintiff." I cannot say that this finding was clearly erroneous. A review of the record reveals that, at the time of the Village's decision to deny the variance, there were at least nine undeveloped tracts of land in excess of fifteen acres zoned R-5 (multi-family housing). The record does not contain a sufficient showing by plaintiffs that it was not reasonably possible to construct the proposed project on one of these sites.

Accordingly, I would affirm the district court's judgment in favor of defendants.

APPENDIX B.

No. 72 C 1453.

UNITED STATES DISTRICT COURT, N. D. Illinois.

Feb. 22, 1974.

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, an Illinois not-for-profit corporation, et al.,

Plaintiffs,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation, et al.,

Defendants,

and

NORTHWEST OPPORTUNITY CENTER, INC., an Illinois not-for-profit corporation, et al.,

Plaintiffs-Intervenors.

DECISION.

McMILLEN, District Judge.

This case came on for trial on the merits, and the court has heard the evidence and considered the exhibits offered and received. The court has also considered the pre-trial stipulation and post-trial briefs filed by the parties and is fully advised in the premises. We find and conclude that judgment should be entered in behalf of all defendants, for the reasons stated hereinafter pursuant to F. R. C. P. 52(a).

Plaintiffs consist of a not-for-profit corporation created to develop housing for low and moderate income tenants and three individuals who seek to represent a class of such persons. The plaintiff corporation owns an option to purchase 15 acres

of vacant land from its present owner, the Clerics of St. Viator. A second not-for-profit corporation intervened as a co-plaintiff but its presence is irrelevant to this Decision.

Plaintiffs contend that their civil rights have been violated by virtue of a decision of the trustees of the Village of Arlington Heights, Illinois, not to rezone the land in question for multiple family housing. Specifically, they allege in Count I that defendants have perpetuated racial segregation by declining to rezone and, in Count II, that the plaintiff corporation has been denied the right to use its property in a reasonable manner. This allegedly constitutes a violation of the plaintiffs' civil rights under Sec. 1981, 1982 or 1983 of the Civil Rights Act and the Fair Housing Act of 1968. 42 U. S. C. §§ 1981, 1982 and 1983, and § 3601 et seq. respectively. No specific section of the Fair Housing Act is referred to in the pleadings and none seem applicable to the facts of this case.

Plaintiffs seek in the case at bar to extend the penumbra of the Fourteenth Amendment considerably beyond its present outer limits. They do not represent persons seeking to eliminate discrimination in existing facilities, whether residential or some other type. They do not represent a landowner seeking to use his property for some purpose within the existing zoning ordinances. Rather, the corporate plaintiff seeks to require defendants to rezone a vacant tract of land so that it can build a Federally subsidized low rent project on it, for occupancy by the class which the individual plaintiffs seek to represent. The justification proposed for using judicial processes to achieve rezoning is to supply housing for low income tenants who desire to work and live in the area. No cases have been cited by plaintiffs to support this extension of the Fourteenth Amendment into area-wide integration, but they rely primarily on familiar cases involving education, employment or public facilities. They also rely on Kennedy Park Homes Ass'n et al. v. City of Lackawanna, N. Y. et al., 436 F. 2d 108 (2nd Cir. 1970), cert. den. 401 U. S. 1010, 91 S. Ct. 1256, 28 L. Ed. 2d 546, where

defendants acquired a tract for discriminatory reasons and were ordered to restore its prior status. We do not find that these authorities support the plaintiffs' objectives in the case at bar, notwithstanding their laudatory motives.

The litigability of this and other legal issues have been decided by our predecessor judge on appropriate motions, and we find no need to reexamine his conclusions. We assume for the purposes of this Decision that the plaintiff corporation has sufficient interest in this property to give it standing to sue. The essence of the alleged offense is the refusal of the Village to accommodate a landowner's desire to use his property as he sees fit, although the plaintiff corporation acquires no different status than any other corporation merely because it has been created for the purpose of developing housing for low income tenants.

[1] The individual plaintiffs, in our opinion, do not represent a definable or manageable class. They purport to represent "low and moderate income minority-group members who work or desire to work in Arlington Heights but cannot find decent housing in Arlington Heights at rents they can afford". Obviously the members of this class would be too heterogeneous and varied to ever be brought into court, and their claims would raise a multitude of different factual questions. Nevertheless, one individual plaintiff, Electeria Muldonado, a Mexican-American, did appear and testify, and her presence along with the corporate plaintiff suffices to raise a case or controversy concerning the validity of the defendants' acts. Since we intend to decide this issue on its merits, we see no purpose to be served by debating the question of standing any further.

Defendants are accused of failing and refusing to rezone the 15 acre tract from an R-3 single-family detached residence use to an R-5 multi-family attached residence use (such as apartments). Plaintiffs took the necessary administrative steps to obtain rezoning and made various changes in its proposal in an attempt to satisfy various objections which were raised by the

Village's Plan Commission. Ultimately, however, the Plan Commission recommended against rezoning the property and the defendant trustees voted 6 to 1 against the proposition on September 28, 1971. Plaintiffs allege that this vote was motivated at least in part by racial discrimination against certain minority groups who work in or around Arlington Heights.

There is no direct evidence by which to determine the motives or mental processes of the trustees, and plaintiffs depend on circumstantial evidence. The crucial fact question, however, is whether the result of the defendant trustees' action caused racial discrimination. As has often been stated, (*e.g.*, Gautreaux et al. v. Romney, 448 F. 2d 731 at 738 (7th Cir. 1971), motives are irrelevant if the effect is illegal. If it is, we would reach the legal question of whether defendants can be required to change the zoning of the property.

Plaintiffs have failed to carry their burden of proving discrimination by defendants against racial minorities as distinguished from the under-privileged generally. They have proved that housing for low-earners is scarce in Arlington Heights and the surrounding suburban area, but this affects the entire group, not merely blacks or Mexican-Americans. The Fourteenth Amendment and the Civil Rights Act prohibit discrimination against blacks and certain other minorities but does not afford rights to poor people as such. Furthermore, some blacks and other minorities do live in Arlington Heights, and an 11% vacancy rate exists for rental property in the Village. What is lacking is low rent property, but even this is available at the corporate plaintiff's project just north of Arlington Heights and nearer to the principal employer of minorities than is the property on which the plaintiff now seeks to build new housing.

There are many reasons why members of minority groups would not necessarily move into the defendant village, besides alleged discriminatory violations. This is illustrated by one of the two blacks who testified as a plaintiff. After his employer had moved its plant to Arlington Heights, he voluntarily moved

farther away and thereby increased his commuting time from 35 minutes to one hour. His motive was to invest in a two-flat, not to live in a suburb near his employment.

[2] There can be no question but that plaintiffs and the group which they seek to represent would be benefited by this proposal. It is not denied by the defendants that citizens with low incomes would find better living conditions in the project and might be able to save expenses by living there. However, plaintiffs do not contend that their jobs are in jeopardy for want of a convenient and economical place to live, and their employers do not contend that they are deprived of an adequate supply of labor in the low-wage brackets. In fact, the employers are not parties hereto and no evidence was presented on their posture in this controversy. The legal issue on this point, therefore, is whether low-income minorities have a constitutional right to live in an area where they work or desire to seek work. Even more broadly, do low-income workers have a constitutional right to low-rental housing either where they work or elsewhere? We know of no such rule of law.

Plaintiffs did prove that the "highest and best use" of this property from an economic standpoint is for multi-family dwellings. High rise apartments such as have been built elsewhere on R-5 property in Arlington Heights are even more economically desirable for the landowner than the low-income project proposed by the plaintiff corporation. However, the issue in this case is whether defendants can be required to zone any real estate for multi-family dwelling if they have good faith reasons for not doing so.

Defendants' evidence shows that the property in question was originally zoned for single-family detached residences and has been continuously so zoned up to the present time. It has always been vacant and is completely surrounded by single family residences, with the exception of a parochial school on the north and the religious order's three-story dormitory on the west, a pre-existing non-conforming use. The village's zoning plan

contemplates the systematic development of land for particular uses with buffer zones or devices between different use zones. In the case at bar, the plaintiffs' project would not constitute a buffer between zones, because no other zone except R-3 exists in the area.

[3] On the other hand, the evidence shows that a multi-family development would seriously damage the value of the surrounding single-family homes and that its presence in the area is strongly opposed by large groups of citizens of the village. Their motive may well be opposition to minority or low-income groups, at least in part, but the circumstantial evidence does not warrant the conclusion that this motivated the defendants. They have zoned 60 tracts for the R-5 use and some of it is still vacant and available to plaintiff—as no doubt are some existing multi-family buildings. The weight of the evidence proves that the defendants were motivated with respect to the property in question by a legitimate desire to protect property values and the integrity of the Village's zoning plan. This is not an arbitrary or capricious act in derogation of the plaintiffs' 14th Amendment rights.

Lest plaintiffs conclude that they are faced with an insurmountable problem of proof, they are referred to a recent decision by this court in the case of Cousins et al. v. City Council of the City of Chicago et al., D. C., 361 F. Supp. 530. There the plaintiffs succeeded in proving that the defendant City discriminated against a black minority when it established the boundaries of the 7th Ward, as evidenced by certain acts and statements of an alderman, changes wrought in a pre-existing ward map, and certain circumstantial evidence. This decision, incidentally, is on appeal.

Another possible deficiency with plaintiffs' case is that the corporation lacks the present capacity to carry out its proposed project. It was to be financed pursuant to Sec. 236 of the National Housing Act of 1968. However, according to the evidence, all funds under this statute have been sequestered and

no projects are now being financed. The plaintiff's option with the owners would terminate if a Sec. 236 project could not be built on the property, but the present Federal funding situation would at least cause this Court to withhold any present relief to the plaintiffs. The sequestration of funds may continue permanently or may change, but once the land is zoned R-5, the process is well-nigh irreversible, and many varieties of buildings could then be constructed by the legal owners in the midst of the existing single-family residential area.

This leads to the question of whether the legal owner of the property has a Federal right to require zoning for the highest and best use. Aside from the statutes cited above (p. 209), no Federal rights are relied upon by the plaintiffs, and these statutes do not reach zoning *per se*. This particular issue was not decided on the motion to dismiss the complaint in Sisters of Prov. of St. Mary of Woods v. City of Evanston, 335 F. Supp. 396 (D. C. 1971).

Also lurking in the background is what conditions a municipal corporation can legitimately require before property is rezoned. Except for the issue of discrimination raised in Count I and the issue of arbitrary and capricious denial of the corporation to use its own property in a reasonable manner raised in Count II, however, the validity of local zoning procedures have not been contested by the plaintiffs and are properly reserved for the state courts.

It is therefore ordered, adjudged and decreed that judgment is entered on the Complaint and on the Intervening Complaint in favor of the defendants.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 13, 1975.

Before

HONORABLE THOMAS E. FAIRCHILD, *Chief Judge*
HONORABLE LUTHER M. SWYGERT, *Circuit Judge*
HONORABLE WALTER J. CUMMINGS, *Circuit Judge*
HONORABLE WILBUR F. PELL, JR., *Circuit Judge*
HONORABLE JOHN PAUL STEVENS, *Circuit Judge*
HONORABLE ROBERT A. SPRECHER, *Circuit Judge*
HONORABLE PHILIP W. TONE, *Circuit Judge*
HONORABLE WILLIAM J. BAUER, *Circuit Judge*

METROPOLITAN HOUSING DEVELOPMENT CORP., et al.,
Plaintiffs-Appellants,

No. 74-1326

THE VILLAGE OF ARLINGTON HEIGHTS, et al.,
Defendants-Appellees,

NORTHWEST OPPORTUNITY CENTER, INC., ELUTERIA D. MALDONADO,
Intervening Plaintiffs-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(72 C 1453)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court having voted to deny a rehearing *en banc*.

IT IS ORDERED that the petition for rehearing and the suggestion that it be heard *en banc* be, and the same are hereby, DENIED.

NOTE: Judge Pell, Judge Tone and, Judge Bauer voted that said petition be granted.

APPENDIX D.

Amendment XIV, Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1866 (42 U. S. C. §§ 1981, 1982)

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Civil Rights Act of 1871 (42 U. S. C. § 1983)

§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-

jured in an action at law, suit in equity, or other proper proceeding for redress.

Fair Housing Act of 1968 (42 U. S. C. §§ 3601, et seq.)

§ 3604. *Discrimination in the sale or rental of housing.*—As made applicable by section 803 [§ 3603 of this title] and except as exempted by sections 803(b) and 807 [§§ 3603(b), 3607 of this title], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin. (Apr. 11, 1968, PL 90-284, Title VIII, § 804, 82 Stat. 83.)

§ 3605. *Discrimination in the financing of housing.*—After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 803(b) [§ 3603(b) of this title]. (Apr. 11, 1968, PL 90-284, Title VIII, § 805, 82 Stat. 83.)

§ 3606. *Discrimination in the provision of brokerage services.*—After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, or national origin. (Apr. 11, 1968, PL 90-284, Title VIII, § 806, 82 Stat. 84.)

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